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No. 79-515

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN SECURITY COUNCIL EDUCATION FOUNDATION,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT CBS INC. IN OPPOSITION

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### OPINIONS BELOW

The majority, concurring, and dissenting opinions of the court of appeals on rehearing *en banc* (Pet. App. A, pp. 1a, 27a, 43a, 46a) appear at 5 Med. L. Rep. (BNA) 1193 (1979). They have not yet been officially reported. The opinion of the Federal Communications Commission is reported at 63 F.C.C.2d 366 (Pet. App. C, p. 174a).

### JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. The petition for a writ of certiorari was filed on September 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350 (a).

## QUESTION PRESENTED

The fairness doctrine of the Federal Communications Commission ("the Commission") requires that, when a broadcaster presents one view on a controversial issue of public importance, it must also present contrasting views on that issue. Petitioner complained that Respondent CBS Inc. ("CBS") had violated the fairness doctrine in its television news broadcasts over a period of time by failing to present contrasting views on "national security" questions. The court below, sitting *en banc*, sustained the Commission's rejection of the complaint on the ground, *inter alia*, that the complaint did not define a controversial issue of public importance within the meaning of the fairness doctrine or identify statements that obviously and meaningfully related to each other or to such an issue.

The question presented is whether the court below correctly concluded that the decision of the Commission was lawful under the fairness doctrine.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides, in pertinent part:

> "Nothing in the foregoing . . . shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."



## STATEMENT

This case involves the application of the Federal Communications Commission's judicially-approved criteria for reviewing fairness doctrine complaints to a complaint filed by Petitioner American Security Council Education Foundation ("ASCEF") against Respondent CBS. ASCEF complained to the Commission that between 1972 and 1976 CBS News provided imbalanced television coverage of "national security" issues by failing to allow a reasonable opportunity for presentation of opposing viewpoints.[1]

ASCEF defined "national security" in several ways during the course of its study,[2] but eventually asserted that the issue embraced all CBS News reports on "United States military and foreign affairs; Soviet Union military and foreign policy; China military and foreign policy; and Vietnam affairs." (Pet. App. A, p. 4a.) Among the news reports that ASCEF thought relevant to these topics—and to its asserted national security issue—were, as the court below summarized, reports of

- President Nixon's remarks and congressional debate on the Strategic Arms Limitations Treaty (SALT);
- Defense Secretary Laird's and various Senators' statements on the defense budget;
- Administration and congressional statements concerning the Trident submarine system and the B-1 bomber;

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[1] "Complaint of American Security Council Education Foundation against Columbia Broadcasting Systems, Inc. (WCBS-TV, *et al.*)" (Sept. 8, 1976), at 8-13.

[2] *See* E. Lefever, *TV and National Defense: An Analysis of CBS News, 1972-1973*, at 74 (nine topics; *see* Pet. App. A., p. 4a n.4), 79 (eight topics plus five subtopics). *TV and National Defense* is ASCEF's report on its study and was incorporated by reference in its complaint. According to the Petition, a copy of the study has been lodged with the Clerk's office. Pet., p. 7 n.6.

- The Democratic Party platform on amnesty for draft evaders;
- Soviet Union involvement in the Middle East;
- Presidential campaign statements of Senator McGovern concerning, among other things, the defense budget, the space shuttle, and troops in Western Europe, South Korea and Indochina;
- The President's trip to China;
- The Vietnam War; and
- The activities of Chinese school children.[3]

ASCEF "dissected" the news reports into sentences, and classified the sentences in three categories,[4] which it called Viewpoints A, B, and C.[5] Under ASCEF's classification, any "opinion that supports the current policy and declared objectives of the U.S. government," [6] by which it meant the policy of the Administration of then-President Richard M. Nixon, was categorized as expressing Viewpoint B, no matter where it might be thought to fall on the spectrum of opinion. Thus, Senator Goldwater's comment on the North Vietnamese—"I'm all for bombing them, and bombing them, and bombing them, and keeping it up until they come to the table and say, 'I want to quit' "—was a "B" viewpoint,[7] as were statements by Secretary of Defense Laird calling for increased national security efforts.[8] Asserted examples of Viewpoint C included a news report that the 1972 Democratic Platform endorsed amnesty for evaders of military service,[9] and an observer's characterization of the musical education of Chinese school children as "concentrated largely on patriotism, social justice, dedication to work, patience, and above all, selfless service to the public." [10] Viewpoint A was supposedly expressed in a statement that, despite their current hospitality, the Chinese had been responsible for the loss of American lives in Korea and Southeast Asia.[11]

[3] Pet. App. A, p. 4a. The court's summary derives from the limited examples of news reports considered relevant to "national security" that ASCEF identified in its report. *See id.* n.5. Only 68 of 2,235 sentences ASCEF says it tabulated are explicitly described or quoted for purposes of the viewpoint analysis, and it is possible to identify only 24 of 274 items allegedly analyzed. *See TV and National Defense*, at 81-85, 90-93, 114-15, 125.

[4] Pet. App. A, p. 5a.

[5] "*Viewpoint A* holds that the threat to U.S. security is more serious than perceived by the government or that the United States ought to *increase* its national security efforts; *Viewpoint B* holds that present government threat perception is essentially correct or U.S. military and foreign policy efforts are adequate[;] and *Viewpoint C* holds that the threat to U.S. security is less serious than perceived by the government or that U.S. national security efforts should be *decreased*." *TV and National Defense*, at 78 (emphasis in original).

[6] *Id.* at 90.



ASCEF concluded that Viewpoint C was expressed in 61.83% of the sentences, Viewpoint B in 34.63% and Viewpoint A in only 3.54%.[12] On the basis of its criteria and these statistics, ASCEF charged that CBS News had violated the fairness doctrine. (*See* Pet. App. A, p. 6a.)

The Commission dismissed ASCEF's complaint for failure to state a *prima facie* case of noncompliance with the fairness doctrine, finding, *inter alia*, that ASCEF

[7] *Id.* at 107, 118.

[8] *Id.* at 82-83.

[9] *Id.* at 84.

[10] *Id.* at 92.

[11] *Id.* at 92.

[12] Pet. App. A, p. 6a; *see TV and National Defense*, at 86. ASCEF also presented data which excluded Vietnam coverage from its analysis. With that material excluded, Viewpoint A was presented in 10.47% of the sentences, Viewpoint B in 54.46%, and Viewpoint C in 35.08%. *Id.*

had failed to identify a sufficiently specific issue.[13] A panel of the United States Court of Appeals for the District of Columbia Circuit reversed, but on review *en banc*, the court held (per Judge Tamm):

> "ASCEF failed to base its complaint on a particular, well-defined issue because (1) the indirect relationships among the issues aggregated by ASCEF under the umbrella of 'national security' do not provide a basis for determining whether the public received a reasonable balance of conflicting views, and (2) a contrary result would unduly burden broadcasters without a countervailing benefit to the public's right to be informed."

(Pet. App. A, p. 18a.)

The court found that ASCEF defined the "national security" issue "by aggregating under a broad umbrella concept individual issues that it determined were relevant to national security." (Pet. App. A, p. 19a.) Such a definition, the court held, did not satisfy the requirement that "a fairness doctrine complaint . . . focus the Commission's attention on a particular, well-defined issue on which coverage was allegedly imbalanced."[14] It noted:

> "Under ASCEF's approach, a broadcast containing a view on SALT, for example, is expected either to conflict with or support a broadcast containing a view on amnesty for draft evaders, detente with China, or the Vietnam War. . . . ASCEF contends that each of these broadcasts also conflicts with a news report concerning the President's trip to China, in which Walter Cronkite stated that the 'gracious

[13] Pet. App. C, pp. 177a-78a.

[14] Pet. App. A, p. 19a; *see National Citizens Committee for Broadcasting* v. *FCC*, 186 U.S. App. D.C. 102, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) ("*NCCB* v. *FCC*"); *Green* v. *FCC*, 144 U.S. App. D.C. 353, 447 F.2d 323 (D.C. Cir. 1971).



> hospitality of our hosts here cannot disguise the fact [that] the weapons they are so proudly displaying . . . have taken uncounted numbers of American lives in Korea and Southeast Asia.' *A view in any of these broadcasts, however, contributes little, if anything, toward informed evaluation of a view in any other. An average viewer realistically could not be expected to perceive such a nexus among them.*"

(Pet. App. A, pp. 20a-21a (citations omitted) (emphasis added).)

The court held that statements so tenuously related cannot form the basis of a fairness doctrine complaint.[15] ASCEF's "blunderbuss approach," the court found, "would contribute little, if anything, toward achievement of the fairness doctrine's goal while posing all the dangers associated with government administration of fairness obligations." (Pet. App. A, p. 26a.) For the absence of a meaningful nexus between assertedly contrasting statements

> "would not only render impossible a determination of reasonable balance *vel non*, but also would place a substantial burden on the broadcaster. A broadcaster must have a clear understanding of the issue forming the basis of a complaint in order to assess its compliance with the fairness doctrine. Unless a broadcaster can recognize the issue 'with precision and accuracy' . . . . proof of compliance with the fairness doctrine would require the production of 'recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time.'"

[15] The court distinguished ASCEF's complaint from one articulating an issue that might be sufficiently specific even though it is made up of "separately identifiable subissues". Pet. App. A, pp. 21a-22a.

(Pet. App. A, p. 24a (citations omitted).) The court concluded that the Commission had "wisely determined" that imposing these burdens on broadcasters would, particularly in news broadcasts, "defeat the [First Amendment] policy of 'encouraging robust, wide-open debate.'" (Pet. App. A, p. 24a (citations omitted); *see New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).)[16]

Three judges of the court of appeals dissented. (Pet. App. A, p. 46a.)

## ARGUMENT

This case presents no substantial issue requiring the attention of the Court. There is no conflict with prior decisions of this Court or with decisions of other courts of appeals. No important question of federal law is presented that has not been previously settled by this Court.

1. Petitioner asserts that this Court should review the Commission's rejection of its individual complaint because the action is symptomatic of an overall, *de facto* Commission policy to evade fairness doctrine enforcement. As the court below found, ASCEF's complaint was patently deficient under existing and well-recognized standards, and ASCEF has made no effort to demonstrate error in the reasons for that conclusion. Under the circumstances, ASCEF's suggestion must be viewed as an effort to gloss over the deficiencies in its own complaint through the use of broad assertions regarding Commission policy that have no record support.[17]

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[16] The court did not reach the several other grounds on which the Commission dismissed Petitioner's complaint. Pet. App. A, p. 26a n.43.

[17] In support of its argument, Petitioner cites statistics for fiscal year 1973 comparing the number of fairness doctrine complaints filed with the number found by the Commission to state a *prima facie* case. Pet., pp. 12 n.10, 24-25. Such statistics tell nothing about the procedures the Commission followed then or follows now in reviewing complaints or about the nature of its decisions in individual cases. That ASCEF finds rejection of substantial numbers of such cases to be "beyond practical belief," Pet., p. 25, is clearly insufficient to trigger review of the considered decision below.



2. The standards stated in the Commission's decision and the opinion of the court below are fully consistent with principles for fairness doctrine enforcement which the Commission has established with judicial approval. The correctness of the application of those principles to the particular facts of this case is obviously not an issue warranting review by this Court.

For reasons made clear in the Statement, *supra*, the Commission and the court below found that ASCEF had failed to define a fairness doctrine issue with adequate particularity. The various news items it identified were not "so obviously and substantially related to the issue [it sought to raise] as to amount to advocacy of a position on [such a] question."[18] The requirement that a complainant define the issue with particularity and show that there has been direct, obvious advocacy of a position on that issue is not new. *See NCCB* v. *FCC*, *supra*, 186 U.S. App. D.C. at 115, 567 F.2d at 1108; *Green* v. *FCC*, *supra*, 144 U.S. App. D.C. at 359, 447 F.2d at 429; *Fairness Report*, *supra*, 48 F.C.C.2d at 21; *Allen C. Phelps*, 21 F.C.C.2d 12, 13 (1969). Nor can it be regarded as a mere technicality. The requirement is the fundamental mechanism limiting the Commission's intrusion into the journalistic process—thereby avoiding

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[18] *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act ("Fairness Report")*, 48 F.C.C.2d 1, 13 (1974), *petition for reconsideration denied*, 58 F.C.C.2d 691 (1976), *aff'd in pertinent part sub nom. National Citizens Comm. for Broadcasting* v. *FCC*, 186 U.S. App. D.C. 102, 567 F.2d 1095 (1977), *cert. denied*, 436 U.S. 926 (1978).

the kind of broad-ranging, loosely focused governmental supervision of day-to-day editorial decisions that would obviously stifle the independence of the broadcast press. Self-restraint of this sort by the Commission has been found to be fully consistent with the Communications Act and supportive of First Amendment principles. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 126-27 (1973). *See also FCC* v. *Midwest Video Corp.*, 99 S. Ct. 1435, 1444 (1979).[19]

ASCEF concedes that the Commission should reject complaints that do not meet these standards. (Pet., p. 24.) That concession alone would call for denial of its petition. In any event, ASCEF's petition never confronts the dispositive findings made below regarding the deficiencies in its complaint. ASCEF argues only that the ability of television critics and commentators who reviewed its study to discern the thrust of its criticism of CBS' news broadcasts demonstrates that its study had stated an issue. (Pet., pp. 19-21.) Yet the study itself sets out several different formulations of the issue. (*See* Pet. App. A, p. 4 n.4; Pet. App. C, pp. 178a-79a.)[20] These multiple

[19] As Judge Bazelon, concurring, pointed out, there remains an open question whether, even if the Commission's role is thus limited, "application of the fairness doctrine to daily news coverage . . . could ever meet the FCC's statutory mandate or the dictates of the First Amendment." Pet. App. A, p. 44a. Judge Bazelon suggested also that in the future "courts may well be required to reassess the statutory and constitutional validity of the fairness doctrine's restraints on the independence of broadcast journalism." *Id.*, pp. 44a-45a. Contrary to ASCEF's suggestions (Pet., pp. 13-14), however, Judge Bazelon recognized that these broader matters were neither presented to nor decided by the court below, but "must await another day." Pet. App. A, p. 45a.

[20] The dissent formulated still another version of the "issue," finding it to be "as plain as day: whether this nation should *do more, less or the same* about perceived threats to its national security." Pet. App. A, p. 75a (Wilkey, J., dissenting (emphasis in original)). (Compare that formulation with the "A-B-C" formulation, *supra* note 5.)



formulations underscore the difficulty that ASCEF's approach would create for everyone involved in or affected by the Commission's administration of the fairness doctrine. No viewer, broadcaster, administrator or judge would ordinarily perceive a news story on amnesty for draft evaders and a report on the President's trip to China to be expressions of views on a single controversial "issue." ASCEF's attempt to portray such disparate items as pieces of advocacy in a common debate rested on the shifting definitions it gave to its amorphous "national security" concept. The Commission and the court of appeals properly held that use of a supposed "issue" subject to so many different understandings and meanings would ill serve the purposes of the fairness doctrine and the First Amendment.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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